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No. 79-1764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

TEXAS DEPARTMENT OF COMMUNITY AFFAIRS,
Petitioner,

v.

JOYCE ANN BURDINE,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
EDWARD E. POTTER
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Washington, D.C. 20006
(202) 789-8600

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For The Fifth Circuit**

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council (EEAC), with the written consent of all parties respectfully submits this brief as Amicus Curiae in support of the Petitioner.[1]

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[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially, all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.*) (Title VII). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether the court below erred in holding that in an individual disparate treatment case, once a plaintiff has established a prima facie case of discrimination, the burden which shifts to the employer is to prove affirmatively, by a preponderance of the evidence, that the employment decision was for a legitimate, nondiscriminatory reason and that persons retained or promoted were better qualified than the plaintiff.[2]

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[2] Because of its interest in issues involving the standard of proof in Title VII cases, EEAC has filed briefs amicus curiae in this Court in *Intl. Bro. of Teamsters* v. *United States*, 431 U.S. 324 (1977); *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395 (1977); *Furnco Construction Co.* v. *Waters*, 438 U.S. 567 (1978); and *County of Los Angeles* v. *Davis*, 99 Sup. Ct. 1379 (1979).

STATEMENT OF THE CASE

Ms. Burdine worked in a program that was completely funded by the U.S. Department of Labor (DOL). Dissatisfied with the Texas Department of Community Affairs' (TDCA) administration of the project, DOL conditioned future funding upon implementation of certain organizational changes, including appointment of a project director and correction of other specified problems, such as overstaffing and lack of communication among the program staff. Subsequently, Burdine applied for the project director position, but a more qualified candidate was selected. Thereafter, as found by the district court, Burdine was terminated in a reduction-in-force in part because of her inability to work well with other employees. As a result of these personnel actions, she filed a sex discrimination charge against TDCA.

The district court denied the relief sought by Burdine, because it found in effect that TDCA had articulated legitimate, nondiscriminatory reasons for its employment decisions. On appeal, the Fifth Circuit affirmed the lower court's determination regarding the promotion discrimination charge but overturned its ruling concerning the discharge. Finding that, with respect to both charges, the plaintiff had established a prima facie case of discrimination, the court of appeals shifted to the employer a burden of proof beyond that required by the district court. Specifically, the Fifth Circuit required TDCA (1) to prove legitimate, nondiscriminatory reasons by a preponderance of the evidence and (2) to prove that the persons promoted or retained were better qualified than was the plaintiff. In stating that this burden of persuasion is not inconsistent with *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978) (per curiam), the court below erroneously distinguished its burden of proof requirement from that in *Sweeney*. (Pet. App. A-11).

SUMMARY OF ARGUMENT

The burden of proof which the Fifth Circuit imposes on defendants in Title VII suits involving allegations of disparate treatment is not in conformance with this Court's decisions in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1977); and *Board of Trustees of Keene State College* v. *Sweeney*, 439 U.S. 24 (1978), that the burden which shifts to the defendant is merely to articulate legitimate, nondiscriminatory reasons for the employment decision and not to prove nondiscriminatory reasons by a preponderance of the evidence. When an employer simply explains its action, it has met its burden of production. *Sweeney*, 439 U.S. at 26 n.2. Except for the Fifth Circuit, all courts of appeals properly apply the *McDonnell Douglas* analysis and leave the burden of persuasion at all times with the plaintiff. The second part of the burden of proof imposed on the employer by the court below—*i.e.*, to prove that the persons promoted or retained were better qualified—also exceeds and conflicts with the proof requirements of *McDonnell Douglas* and inappropriately applies principles of disparate impact proof in a disparate treatment case.

ARGUMENT

THE BURDEN OF PROOF WHICH THE COURT BELOW REQUIRED THE DEFENDANT TO MEET IS INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND INAPPROPRIATELY PLACES A BURDEN OF PERSUASION ON EMPLOYERS IN CASES INVOLVING INDIVIDUAL ALLEGATIONS OF INTENTIONAL DISCRIMINATION

1. After a Prima Facie Case of Discrimination Has Been Established in a Disparate Treatment Case, The Burden of Proof Which Shifts to The Employer is to State a Valid Reason For The Employment Decision

Beginning with *McDonnell Douglas* and continuing through *Sweeney*, this Court has consistently and without equivocation instructed that, in individual disparate treatment cases under Title VII, the burden that shifts to the employer, after the complainant has made a prima facie showing of discrimination,[3] is only the burden of

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[3] For an individual plaintiff to establish a prima facie case of discrimination under a disparate treatment theory, the Court held in *McDonnell Douglas* that a plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. 411 U.S. at 802 (footnote omitted).

These elements of proof may be applied to allegations of sex discrimination involving promotions and discharges, as here.

Once a plaintiff has proven these elements, "[t]he burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason [for the employment decision]. . . . [T]his suffices to discharge the petitioner's burden of proof

"articulat[ing] some legitimate, nondiscriminatory reason" for the employment decision. *McDonnell Douglas*, 411 U.S. at 802; *Furnco*, 438 U.S. at 577; and *Sweeney*, 439 U.S. at 25. Although in *Furnco*, 438 U.S. at 576-577, the words "proving" and "articulating" (legitimate, nondiscriminatory reasons) were used interchangeably in describing the defendant's burden, this Court clarified in *Sweeney* that "under *Furnco and McDonnell Douglas* the employer's burden is satisfied if he simply '*explains* what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons'." 439 U.S. at 25 (emphasis added).[4] Moreover, Justice Stevens' dissent in *Sweeney* further clarifies the limited burden of production resting upon the defendant in a disparate treatment case:

> In litigation the only way a defendant can "articulate" the reason for his action is by adducing evidence that *explains* what he has done; when an executive takes the witness stand to "articulate" his reason, the litigant for whom he speaks is thereby proving those reasons. *Id.* at 28-29 (emphasis added).
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> * * * *
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> [I]t is only the burden of producing evidence of legitimate nondiscriminatory reasons which shifts to the employer; the burden of persuasion . . . remains with the plaintiff. *Id.* at 29.

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at this stage and to meet respondent's prima facie case of discrimination." *Id.* at 802-803. The plaintiff, however, must then "be afforded a fair opportunity to show that the petitioner's *stated reason* . . . was in fact a pretext . . . [or] a coverup for a . . . discriminatory decision." *Id.* at 804-805 (emphasis added).

[4] In doing so, the Court explicitly rejected the First Circuit's formulation that the defendant "prove absence of discriminatory motive," finding it to be a substantially heavier burden then merely articulating some legitimate, nondiscriminatory reason. 439 U.S. at 24-25.

It is now clear, therefore, in all circuit courts except the Fifth Circuit, that *McDonnell Douglas* leaves the burden of persuasion at all times with the plaintiff in Title VII suits involving individual allegations of intentional discrimination.[5] Consequently, the employer's burden to "articulate" a legitimate, nondiscriminatory reason does not require, as under the Fifth Circuit's formulation, that it prove those reasons by a preponderance of the evidence or in effect persuade the trier of fact that it acted for legitimate rather than discriminatory reasons. Instead, it is a burden of production, that is, to state a valid reason, after which the complainant under *Mc-*

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[5] Except for the Fifth Circuit, all other circuit courts limit the defendant's burden of production to articulating or stating legitimate, nondiscriminatory reasons. *See, e.g., Sweeney* v. *Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1980), *cert. denied*, 48 U.S.L.W. 3465 (U.S. 1980); *Lieberman* v. *Gant*, 23 FEP Cases 505 (2d Cir. 1980); *Kunda* v. *Muhlenberg College*, 22 FEP Cases 62 (3d Cir. 1980); *Ambush* v. *Montgomery City Government*, 22 FEP Cases 1101 (4th Cir. 1980); *Abrams* v. *Johnson*, 534 F.2d 1226 (6th Cir. 1976); *Holder* v. *Old Ben Coal Co.*, 21 FEP Cases 1463 (7th Cir. 1980); *Kirby* v. *Colony Furniture Co., Inc.*, 613 F.2d 696 (8th Cir. 1980); *Miller* v. *Williams*, 20 FEP Cases 809 (9th Cir. 1979); *Hernandez* v. *Alexander*, 607 F.2d 920 (10th Cir. 1979); and *Chalk* v. *Secretary of Labor*, 565 F.2d 764 (D.C. Cir. 1977). Relying on this Court's holdings, the Second Circuit in *Lieberman* explicitly rejected the burden of proof standard required by the Court below.

At least two Fifth Circuit decisions appear to be in conformance with the *McDonnell Douglas-Sweeney* line of cases, although neither relied on *Sweeney* as authority. *See Blum* v. *Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (panel decision) (per curiam); and *Jepsen* v. *Florida Bd. of Regents*, 21 FEP Cases 1700 (5th Cir. 1980). More recently, however, in *Jeffries* v. *Harris County Community Action Assn*, No. 77-1848 (5th Cir. April 21, 1980), the Fifth Circuit required the defendant to meet the same erroneous burden of proof as in the instant matter.

Donnell Douglas has an opportunity to show that the stated reason was in fact pretextual or a coverup for a discriminatory decision. 411 U.S. at 804-805.

That the employer merely has a burden of production logically follows the burden of proof scheme of *McDonnell Douglas* because, if the employer were to prove by a preponderance of the evidence his reasons—or in effect that his reasons were not a pretext—there would be no justification for the third stage of the *McDonnell Douglas* analysis, which allows the complainant to show that the reason was a pretext. *Sweeney*, 439 U.S. at 24 n.1. To say that the defendant must prove that its action was based on a legitimate reason, and then that the plaintiff has an opportunity to prove that it was not, is contradictory and not in conformance with the principles of *McDonnell Douglas*. *Loeb* v. *Textron*, 600 F.2d 1003, 1012 (1st Cir. 1980).

The Fifth Circuit's heavier burden of proof requiring the defendant "to prove legitimate, nondiscriminatory reasons for his actions by a preponderance of the evidence" was established in *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977), on which the court below relied. The *Turner* court established its erroneous proof standard on the faulty proposition that:

> If an employer need only *articulate*—not prove—a legitimate, nondiscriminatory reason for his action, he may compose fictitious, but legitimate, reasons for his actions. The employer would have met his burden under *McDonnell Douglas*, and the plaintiff would find himself attempting to prove that a reason without factual foundation—presumed true—was a pretext for discrimination. *Id.* at 1255.

This reasoning cannot be reconciled with the proof requirements of *McDonnell Douglas*. If the employer's rea-

sons are fictitious and if the plaintiff demonstrates that they are, these reasons would not be legitimate or valid and would constitute, accordingly, a pretext or coverup for discrimination. *See McDonnell Douglas*, 411 at 804-805. *See also, e.g., Loeb*, 600 F.2d at 1012 n.6. ("The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if it indeed is one"); *Sabol* v. *Snyder*, 524 F.8d 1009, 1111 (10th Cir. 1974) (Employer's reason that the other applicant was better qualified was shown to be a pretext); and *Gates* v. *Georgia Pacific*, 492 F.2d 292, 296 (9th Cir. 1974) (Employer's promotion from within policy was not a *valid* reason because the company also advertised for the position in the newspapers). The proper application of *McDonnell Douglas*, therefore, adequately addresses the concerns of the *Turner* court, and in any event, as shown above, the Fifth Circuit's approach would make entirely superfluous the third step of the *McDonnell Douglas* analysis. See p. 8, *supra*.

2. The Fifth Circuit's Burden of Proof Requiring Employers to Show That The Person Promoted or Retained Was Better Qualified is Inconsistent With *McDonnell Douglas* And is Premised on Principles of Proof in Disparate Impact Rather Than Disparate Treatment Cases

Similarly, there is no proper foundation for the second requirement in the Fifth Circuit's burden of proof; *i.e.*, that the employer prove that the person promoted or retained was better qualified than the complainant. The fact that the person promoted or retained may be better qualified than the plaintiff is but one of many possible legitimate, nondiscriminatory reasons for employment decisions.

Significantly, the Court in *McDonnell Douglas* placed no restrictions or limit on the types of reasons which

appropriately may be legitimate and nondiscriminatory [6] and certainly did not mandate that the employer proffer evidence concerning the relative qualifications of candidates. Indeed, the facts of that case did not lend themselves to a comparison of qualifications which the Fifth Circuit mandates in this case. There, a black mechanic, who had been laid off in the course of a general reduction-in-force protested his discharge by participating in activity that blocked the entrance to his former employer's plant. Subsequently, McDonnell Douglas advertised for qualified mechanics, but rejected the plaintiff's application because of his participation in unlawful conduct. Although there was no comparison of qualifications, this Court found that the defendant's subjective reasons were "suffic[ient] to discharge petitioner's burden of proof . . . and to meet respondent's prima facie case of discrimination." 411 U.S. at 803. Of course, in appropriate circumstances the fact that one candidate is better qualified than another may be the employer's reason for the personnel decision, but as shown above, an employer need not prove this by a preponderance of the evidence. The burden of persuasion remains with the plaintiff and the validity of such a reason can be shown to be a pretext at the third stage of the *McDonnell Douglas* analysis.

In *East* v. *Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975), relied on by the court below, the Fifth Circuit established the comparative evidence standard relative to qualifications which is at issue here. The underpinnings for its view that "comparative evidence lies at the heart of a prima facie case of discrimination" draws its support, however, from principles of proof involved in a disparate

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[6] In this regard, the Court stated: "We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire." 411 U.S. at 802-803. Nothing in *Furnco* or *Sweeney*, moreover, alters this view of the Court.

impact theory of discrimination, not disparate treatment.[7] *Id.* at 339. Because there are fundamental differences between the two theories of discrimination, principles of proof involved in individual disparate impact cases are not applicable or transferable to individual disparate treatment cases. *Cf. Furnco*, 438 U.S. at 583 (Marshall, J., concurring and dissenting) ("[O]ur cases establish a different way of proving [disparate impact]").

In a disparate impact case, the plaintiff alleges that employment practices that are neutral on their face and in their intent, discriminate in effect against a protected group. *See Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-32 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 422 (1975); *Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977); and *Intl. Bro. of Teamsters* v. *United States*, 431 U.S. 324, 335-336 n.15. Although "[p]roof of discriminatory motive is critical" in a disparate treatment case, such "[p]roof of discriminatory motive . . . is not required under a disparate impact theory." *Teamsters*, 431 U.S. at 335-336 n.15. *See also, Furnco*, 438 U.S.

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[7] The Fifth Circuit in *Romine* stated:

> This need for comparative evidence is vital in this field of law. It is exemplified in the cases in which "objective criteria", such as performance tests and educational attainment, have been used to make employment decisions. In many of these cases the trial judge must decide whether a performance test sufficiently measures the skills necessary for the job. But in no case that we have found has the judge held that merely introducing the raw score of blacks and women on such a test constitutes a sufficient rebuttal to charges of discrimination. The employer must show that those whom he has hired or promoted have done better on the examination than those who were rejected or denied promotion. 518 F.2d at 339-340.

at 583 (Marshall, J., concurring and dissenting). Thus, in contrast to a disparate treatment theory of discrimination, an allegation of disparate impact by an individual focuses on the "*consequences* of employment practices, not simply motivation" which have affected the complainant as well as others. *Griggs*, 401 U.S. at 432 (emphasis in original). Consequently, once a plaintiff has established a prima facie case of disparate impact, comparative evidence of the qualifications or performance of those who have been selected or retained may be very relevant, because the burden which shifts to the employer is not to explain the reasons for nonselection as in a disparate treatment case, but rather to show that the selection procedure "bear[s] at demonstrable relationship to successful job performance." *Griggs*, 401 U.S. at 431. Comparative evidence of qualifications, however, is significantly less pertinent in individual disparate treatment cases, because an individual complainant is "seeking to prove one instance of discrimination. An employer's isolated decision to reject an applicant . . . does not show that the rejection was [discriminatorily] based." *Teamsters*, 431 U.S. at 358 n.44.

In sum, the defendant's burden of proof in cases involving individual allegations of intentional discrimination is qualitatively different than that in cases involving issues of disparate impact and, accordingly, does not necessitate in all circumstances comparative evidence of qualifications to rebut a prima facie case. More importantly, as *McDonnell Douglas* shows, the relative qualifications of candidates may not be the only legitimate, nondiscriminatory reason for not promoting or retaining an employee.

CONCLUSION

The burden of proof which the Fifth Circuit required the employer to meet is inconsistent with prior precedent of this Court and interferes with the practical scheme for proof established in *McDonnell Douglas* for addressing the critical issue of intentional discrimination. For the reasons given above, the Amicus Curiae urges the court to reverse the decision of the Court of Appeals for the Fifth Circuit below and sustain the district court's denial of the Respondent's claim.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
EDWARD E. POTTER
MCGUINESS & WILLIAMS
1015 15th Street, N.W.
Washington, D.C. 20006
(202) 789-8600

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